10/17/2016 8:12:44 AM
Chris Daniel - District Clerk Harris County
Envelope No. 13262645
By: Shaniece Richardson
Filed: 10/17/2016 8:12:44 AM

CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL INVESTMENTS, L.P., and ASPIRE COMMODITIES, L.P., Plaintiffs	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
CRAIG TAYLOR and ATLAS COMMODITIES, L.L.C., Defendants	§	157TH JUDICIAL DISTRICT

CAUSE NO. 2015-49014

ERIC TORRES, Plaintiff	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
S. JAMES MARSHALL, Defendant	§	157TH JUDICIAL DISTRICT

DEFENDANTS' FOURTH AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

Defendants Craig Taylor ("Taylor"), Atlas Commodities, LLC ("Atlas"), and James Marshall (collectively "Defendants") file this, their Fourth Amended Answer, Affirmative Defenses, and Counterclaim complaining of Plaintiffs Eric Torres ("Torres"), Adam Sinn ("Sinn"), XS Capital Management, LP ("XS"), and Aspire Commodities, LP ("Aspire") (collectively "Plaintiffs") as follows:

I. GENERAL DENIAL

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendants generally deny all of Plaintiffs' allegations and demand strict proof thereof by a preponderance of the evidence.

II. Answer and Affirmative Defenses

2. Defendants further answer that:

a. XS does not have the legal capacity to sue.

b. XS is not entitled to recover in the capacity in which it sues.

c. XS is not a Texas limited partnership as alleged.

3. Defendants assert the following affirmative defenses:

a. Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

b. To the extent Plaintiffs seek equitable relief, their claims are barred by the doctrines of estoppel, laches, and waiver.

c. Plaintiffs failed to mitigate their damages, if any.

d. Plaintiffs repudiated the contract.

e. Excused performance.

III. Plea in Abatement

4. Plaintiff XS Capital Management, LP is not a limited partnership registered to do business in the State of Texas.

5. XS is not entitled to maintain suit. Its claim (if any) should be abated until such time as Plaintiffs amend their pleadings to properly reflect parties that may maintain a lawsuit in the State of Texas. In the alternative, XS is a sole proprietorship for which Sinn is liable.

IV. Counterclaim

A. Discovery

6. Discovery is intended to be conducted at level 2. Rule 190.3.

B. Parties

7. Defendant/Counter-Plaintiff Craig Taylor is an individual residing in Harris County, Texas.

8. Defendant/Counter-Plaintiff Atlas Commodities, LLC is a Texas limited liability company.

9. Plaintiff/Counter-Defendant Adam Sinn is an individual residing in either Harris County, Texas or Puerto Rico.

10. Plaintiff/Counter-Defendant Eric Torres is an individual residing in Harris County, Texas.

11. Plaintiff/Counter-Defendant Aspire Commodities, L.P. is a Texas limited partnership.

12. Plaintiff XS Capital Management, L.P. purports to be a Texas limited partnership, but is in fact a sole proprietorship owned and managed by Adam Sinn.

C. FACTS

13. Atlas is a commodities brokerage. For the most part, it brokers energy products, facilitating the transfer, storage, and purchase of gas, electricity, physical crude and related commodities.

14. Eric Torres, a licensed commodities broker, is a former Atlas employee.

15. Craig Taylor is Atlas' majority shareholder.

16. In or about September 2010, Torres and Taylor entered into negotiations for Torres to purchase an equity interest in Atlas. The idea was that Torres would buy into Atlas, establish and run Atlas' electricity/power transactions (known as ERCOT).

17. Taylor agreed to sell a 25% ownership interest in Atlas to Torres for $750,000. An additional 10% interest in Atlas was conveyed subject to reversion if Torres failed to meet certain revenue goals.

18. At the time of that sale, Torres represented to Taylor and Atlas that the money he used to purchase his shares in Atlas were his or his wife's. In fact, the money came from Sinn, an energy trader.

19. Having a trader own or possess a financial interest in a brokerage is potentially catastrophic for the brokerage. Other traders – those on whom the brokerage depends for its business – would, justifiably, refuse to conduct business with a brokerage knowing another trader is financially invested in the success of the company. For a trader to have such a financial interest in the brokerage would cause the market to believe that the brokerage, which is required to be neutral between traders, favored the invested trader. This would, inevitably, destroy the brokerage. Torres and Sinn therefore went to great lengths to conceal the fact that Sinn financed Torres' purchase.

20. Soon after Torres "purchased" "his" shares in Atlas, rumors began circulating that Sinn was the source of Torres' investment funds. Taylor and others at Atlas questioned Torres, who insisted that the money was his or his wife's. When asked for some evidence to support Torres' contention, he prevaricated, stalled for time and lied – repeatedly.

21. When it became clear that Sinn had financed Torres' investment and was the true owner of Atlas' shares and had, with Torres, done everything possible to conceal this crucial fact, a meeting was held between Torres, Sinn, their representatives, and Taylor, James Marshall (a 10% Atlas owner), Atlas and their representatives. Atlas offered to simply return all of Sinn's money in exchange for return of Atlas' shares and Torres' departure. Atlas was prepared to absorb the damage that had been done to the company and its reputation in order to be rid of Sinn and Torres. Sinn and Torres refused.

22. In the meantime, extremely damaging rumors circulated in the energy industry that Sinn owned a share of Atlas. Customers began refusing to do business with Atlas as a result. Atlas representatives travelled around the country reassuring customers, potential customers, and anyone who would listen that neither Sinn nor any other trader had any undue influence on the company.

23. As he did here, Torres preemptively filed suit against Atlas, Taylor and Marshall. Atlas and Taylor counterclaimed and joined Sinn, XS and Aspire for, among other things, rescission of the sale to Torres/Sinn of Atlas shares. As discovery progressed, it became increasingly obvious that Torres and Sinn could no longer conceal the fact that Sinn secretly funded Torres' purchase and did everything possible to keep that fact hidden.

24. A settlement was reached and on August 15, 2013, a settlement agreement was signed (the "Settlement Agreement"). Though Sinn/Torres had paid $750,000 for shares of Atlas and the company had grown since the sale, Atlas/Taylor agreed to buy back their shares for $500,000 paid out without interest over two years as follows: $250,000 up front, and then $10,000 per month for twenty-five months.

25. Return of Sinn/Torres' shares of Atlas was to, and did, take place immediately.

26. Taylor and Atlas made the $250,000 payment, and four subsequent payments of $10,000 each. The case was dismissed with prejudice and, at Sinn's request, the records were sealed.

27. Taylor and Atlas' payment under the Settlement Agreement was to be made to Sinn's lawyer, not Torres'. Defendants had no way of knowing – in the face of the non-assignment clause – that this payment and future payments would stay with Sinn and not be transferred to Torres. This would not have been the case had Torres and Sinn not defrauded Atlas and Taylor in the first place.

28. The Settlement Agreement contained the following non-disparagement provision:

> **Non-Disparagement.** The Parties agree that in exchange for the consideration provided under this agreement, the Parties shall not directly or indirectly, disparage, make or publish any false, derogatory, slanderous or libelous comments about any other Party regarding any matter likely to be harmful to the Party's business, business reputation, or personal reputation. Further, the Parties agree that they shall not solicit from any third party any comments, statements, or the like that may be considered negative, false, derogatory or detrimental to the business reputation of any other Party. Further, the Parties agree that they will not restrict, limit, or prohibit any third party or employee form socializing, fraternizing, or doing business with any other Party.

Exhibit M, the Settlement Agreement at p. 7, ¶19.

29. On December 22, 2013 at 12:06 a.m., four months after execution of the Settlement Agreement, Taylor was at home watching television. His phone lit up, indicating that he had received a text message. It was from Sinn. The message contained no text, just a photograph of Sinn, Torres, Barry Hammond (another of Sinn's lawyers), and a few other energy traders, Evan Caron, Paul Sarver, and Sean Kelly. They are standing in front of a Christmas tree – and all but Caron are extending their middle fingers at the camera. Exhibit A. At the time the picture was taken, Caron and Kelly were traders at companies which do business with Atlas. Sarver is a former Atlas employee who now works for a competitor.

30. In addition to being juvenile and stupid, the unsolicited contact by Sinn was a breach of the Settlement Agreement.

31. Taylor and Atlas were nevertheless not interested in reinstituting litigation or seeing the settlement unravel because Sinn and a few apparently intoxicated friends were not imaginative enough to do anything more amusing than say "f-you" with their fingers. So on Monday, December 23, 2013, Counsel for Taylor and Atlas sent the following email to counsel for Torres and Sinn:

> As you know, the settlement agreement between our clients contains confidentiality and non-disparagement clauses. I can't say I've ever seen a

> violation of those provisions quite like this one, but Mr. Sinn texted the attached picture to Craig Taylor this past weekend. As you can see, the photo features Mr. Sinn and Mr. Torres. Also making an appearance is Chanler's co-counsel, not exactly living up to the highest standards of professionalism by upholding his middle finger instead of the dignity of the profession, as the rules require.
>
> Whether they thought they were being funny or trying to accomplish something else isn't clear. I'm going to guess, though, that this picture was not taken right after your clients and co-counsel either refused to discuss Atlas, Taylor, Marshall or the settlement or used "words to the effect that all disputes among [the Parties] have been fully settled and resolved" and nothing else, as the agreement requires.
>
> It looks to me like they were just drunk. Whatever the case, Mr. Taylor isn't amused, and I don't blame him.
>
> This case took a lot of effort from all of us to get settled and I don't want to undo it over this. Without waiving Atlas' right to act in response to any future violation(s), and without asking that either of your clients admit to having violated it, request is made that Mr. Sinn, Mr. Torres and Chanler's co-counsel (whose name escapes me at the moment) each apologize to Mr. Taylor before Christmas and then leave him alone.
>
> If you would like to discuss, please let me know.

Exhibit B.

32. The next day, counsel for Sinn responded by saying that the picture was not intended for Taylor, but was in fact sent to people associated with ***Atlas*** with the tag line "Happy Holidays from ***Atlas***." Exhibit C (emphasis added). This of course would be a far more serious breach of the Settlement Agreement than originally believed, so counsel for Atlas and Taylor wrote back just over an hour later requesting (i) that Sinn provide "the picture with the tag line, a list of senders, and a full list of recipients, including all names, phone numbers, and email addresses," and (ii) that no related material be deleted or destroyed. Exhibit D.

33. Soon after receiving demand that no evidence be deleted or destroyed, Torres destroyed his phone. All relevant text messages were lost as a result.

34. Later that night (at 8:30 on Christmas Eve), counsel for Sinn emailed again, explaining that in his response to counsel for Atlas, he typed "***Atlas***" when what he meant was "***Aspire***," Sinn's company. In other words, Sinn was now claiming that the photograph was sent to people associated with ***Aspire*** with the tag line "Happy Holidays from ***Aspire***". Along with this explanation, counsel for Sinn forwarded to counsel for Taylor and Atlas an email from Sinn in which he explained:

> I thought I was sending the photo to someone else, I know multiple Craig's [sic] and even two Craig Taylor's [sic] believe it or not. This is the first I've learned of Craig Taylor getting sent this photo errantly. Everyone needs to lighten up a bit, and yes I sent it to a bunch of folks as a joke. If Craig has [sic] issue I can surely apologize, but in now [sic] way are the others in the photo apologizing for something I did by accident.

Exhibit E.

35. The next day, Wednesday, December 25, counsel for Taylor and Atlas again emailed counsel for Sinn, pointing out that the message received by Taylor contained no text – no "tag line" – at all, just a picture, and requesting that he forward what Sinn now claimed were "holiday cards" to ***Aspire*** associates by Friday, December 27. Exhibit F.

36. By the following Tuesday, December 31, Sinn had not responded at all, so counsel for Taylor and Atlas again emailed counsel for Sinn and said:

> I didn't receive any of these, so I will assume your client does not intend to provide them.
>
> Contacting people associated with Atlas with an obscene message purporting to be "from Atlas" is a violation of the settlement agreement. This breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas, which will now consider what action it should take to protect itself.

Exhibit G.

37. The following day, January 1, 2014, counsel for Sinn emailed the following *non sequitur* to counsel for Taylor and Atlas:

> I assume from your response that you did not understand that I wrote a typo in my previous email. The places where I referenced "***Atlas***" should have referenced "***Aspire***." It is my understanding that Mr. Taylor received the message and photo in error. It was not meant for him to receive it and it was not directed at him either. Indeed, the message had nothing to do with Mr. Taylor or the lawsuit that we amicably resolved.
>
> We did not send any messages to people associated with your client's company, we also did not purport to send any messages "from" your client's company. This apparently is all a big misunderstanding. I don't think it would be appropriate to claim that the mistaken message or my typo is some breach of the settlement agreement. I also don't think it would be appropriate to unilaterally cease your clients performance under the settlement agreement based on a mistaken text message.
>
> With that said, we sincerely apologize for any inconvenience this may have caused you and your client.

Exhibit H (emphasis added).

38. Taylor and Atlas hoped Sinn was being truthful. The last thing Taylor or Atlas wanted was to have Sinn play what passes to him as a “joke” on Atlas by defaming the company and breaching the settlement agreement. Given Sinn’s past fraudulent conduct directed at Taylor and Atlas, his reputation for dishonesty, and days-long dissembling in the wake of Taylor’s receipt of the defamatory text, and consistent refusal to provide a single shred of proof that what he was saying was true, however, Taylor and Atlas were in no way prepared to simply take Sinn’s word for it.

39. The next day, January 2, 2014, counsel for Taylor and Atlas responded to counsel for Sinn:

> Thanks for the clarification, but I do understand that you claim your previous email's reference to Atlas was a typo. I hope that is the case and look forward to receiving the original texts with the original tag lines and a list of recipients so that it can be confirmed.

Exhibit I. Again, Sinn did not respond.

40. On January 7, still having had no response from Sinn, counsel for Taylor and Atlas emailed again, this time pointing out that Sinn had to that point simply ignored repeated requests that he produce whatever it was that he sent out, so:

> Request is made -- again -- that you provide the original texts in full, with a list of senders and recipients. If you do not provide it by the close of business on Friday, January 10, 2014, Atlas will assume that it is because to do so would confirm Mr. Sinn and Mr. Torres' breach of the settlement agreement.
>
> Breach by Mr. Sinn and Mr. Torres excuses further performance by Atlas. If Mr. Sinn or Mr. Torres have breached the settlement agreement, Atlas will have no obligation to make further payment, and such payments will not be made.

Exhibit J.

41. That same day, instead of simply producing the texts which Sinn claimed would vindicate him, thus avoiding this entire dispute, he invoked the mediation clause of the Settlement agreement, requesting that the parties make themselves available for a teleconference with the parties' agreed mediator, Paul Clote. Exhibit K.

42. Taylor and Atlas agreed about an hour later, but pointed out that none of this would be necessary if Sinn would simply produce the documents he claimed would exonerate him: Taylor and Atlas would not invoke their right to cease performance, no attorneys' fees would be incurred, and no costs of any kind would be necessary. If litigation followed, Taylor and Atlas would be entitled to production of those messages in discovery anyway – all at much greater expense than simply producing them ahead of time. All Sinn had to do was show Taylor and Atlas – even Taylor and Atlas' counsel for his eyes only – what Sinn claimed were messages unrelated in any way to Atlas or Taylor. Counsel for Taylor and Atlas therefore responded:

> I agree that Mr. Sinn and Mr. Torres' breach of the settlement agreement requires that the parties to confer with Paul Clote before initiating any

> action. I am available tomorrow afternoon anytime, Thursday from 1:30-2:45, Friday morning until 11:00, and Tuesday the 14th from 1:30-3:00.
>
> As you know, if Mr. Clote is not able to assist us in resolving this matter and litigation follows, your clients will be required to produce in discovery what we're requesting now. If the texts didn't mention Atlas or go to anyone associated with Atlas, as you now claim, there will be nothing to drag third parties into. If that isn't the case, however, we will find out about it during discovery and those third parties will, at a minimum, be witnesses anyway. It is curious that Mr. Sinn and Mr. Torres would prefer to spend time and money jumping through all of these hoops instead of just forwarding what they claim would exonerate them and dispose of this issue completely.
>
> Neither Mr. Sinn nor Mr. Torres have any reason to believe that Atlas wants to litigate further, as you now claim. It doesn't. Craig Taylor, James Marshall, and Atlas want nothing more to do with your clients. It wasn't Atlas that contacted them and it isn't Atlas which is refusing to prove something so simple.
>
> If this was all a mistake, proving it is easy (which I guess you don't deny since you promise to provide some of the evidence to Mr. Clote). What makes absolutely no sense at all is to insist on spending thousands of dollars going through a mediator instead of just forwarding the requested information. It does make sense if Mr. Sinn and Mr. Torres have something to hide, though.
>
> If your clients were actually concerned that Atlas was looking for an excuse to initiate litigation, you could have asked at any time over the last two-plus-weeks for an assurance that if you provided the material, Atlas would consider the issue resolved. Atlas would have said yes because litigation isn't what it wants. Instead, Mr. Sinn and Mr. Torres have done everything they can not to have to turn over what they sent out.
>
> Mr. Sinn, XS, Aspire, and Mr. Torres are in breach of the settlement agreement. Because of their breach, further performance by Mr. Taylor, Mr. Marshall, and Atlas is excused. This email will be printed and sent by certified mail and facsimile to you and Melissa pursuant to paragraph 20 of the Settlement Agreement.

Exhibit L. Because Plaintiffs' breach excused further performance by Defendants, payment from Atlas and Taylor to Sinn was halted.

43. The parties mediated, first by phone and then in person. Sinn steadfastly refused to produce what he actually sent.

44. Weeks, and then months went by. Despite repeated requests, Sinn never produced the material he apparently still maintains would exonerate him. Meanwhile, because Sinn, Torres, XS, and Aspire have breached the Settlement Agreement, further performance by Atlas, Taylor, and Marshall is excused and no further payments have been made.

45. Sinn and Torres have now admitted that Sinn was the source of the funds Torres used to purchase a share of Atlas.

46. Notwithstanding their motions for summary judgment and their affidavits in support of them (in which they falsely represented to the Court that Torres was entitled to payment under the Agreement), Torres assigned his right to recover under the Agreement to Sinn. In testimony given in 2015, Torres and Sinn each admitted that Torres assigned his right to recover under the Agreement to Sinn and had accordingly given all money paid under the Agreement to Sinn.

47. Apparently realizing that assigning any right or obligation under the Agreement is a breach of contract, Torres and Sinn later changed their stories – yes, they say, a document called "ASSIGNMENT OF INTEREST IN SETTLEMENT AGREEMENT AND AMOUNT" was executed by Torres in Sinn's favor and yes all of the money paid under the Agreement to Torres went to Sinn and yes, Torres plans on giving the rest to Sinn, but no assignment exists.

48. In addition to being completely at odds with the affidavits they filed in support of their motions for summary judgment and the testimony each gave in 2015, the Torres/Sinn assignment is itself a violation of the Agreement.

49. The assignment from Torres to Sinn was, according to Torres' testimony in this case, executed between the time the parties settled the underlying matter at mediation and the time they entered into the Settlement Agreement. After years of requests, objections, and obstruction,

the Plaintiffs did finally produce the assignment (following an order from the Court that they do so). The assignment is dated June 30, 2013 – six weeks before execution of the Settlement Agreement, in which Torres warranted the following:

> Torres hereby represents and warrants that he has not assigned or otherwise transferred to any other person or entity any interest in any claims, actions, demands and/or causes of action he has, or may have, or may claim to have in connection with the matters released hereby and/or the persons and entities released herein. . .

Exhibit M, p. 5, ¶11 (entitled "Warranty by Torres").

50. Paragraph 27 of the Agreement is entitled "Successors and Assigns," and reads as follows:

> The rights of the Parties hereto, and any of their subsidiaries and affiliates, shall inure to the benefit of any and all of their successors and assigns. **No Party may assign any of its rights or delegate any of its duties hereunder without the written consent of the other Parties**.

Exhibit M, p. 8-9, ¶27 (emphasis added). None of the Atlas parties consented to the Torres-Sinn assignment, nor were they ever asked.

51. Atlas and Taylor would not have agreed to payment to Sinn, which is precisely why Plaintiffs did not ask. Atlas and Taylor have been deprived of the benefit of the bargain.

52. Because Torres and Sinn never intended to honor the non-assignment clause of the Agreement, they procured Atlas and Taylor's agreement and the $290,000 first payment by fraud.

53. At a minimum, the Plaintiffs' dissembling, changing stories, destruction of evidence, obstruction, refusal to provide documentation to support their demonstrably false claims of compliance, and their years of obfuscation forced the Defendants to hire lawyers and prosecute this matter simply to corroborate the Plaintiffs' story. When Defendants requested adequate assurance that Plaintiffs had complied and intended to comply with the Settlement Agreement, not

only were no such assurances given, Plaintiffs engaged instead in a years-long effort to obstruct Defendants.

D. CAUSES OF ACTION

DECLARATORY JUDGMENT

54. An actual, existing, and bonafide controversy exists among the parties to the Agreement that should be determined by declaratory judgment. Therefore, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, Taylor, Atlas, and Marshall seek declarations that:

(i) Plaintiffs breached the Settlement Agreement's non-disparagement clause by making derogatory comments about them to third parties likely to be harmful to their personal or business reputations;

(ii) Plaintiffs breached the Settlement Agreement's non-disparagement clause by soliciting from third parties comments and/or statements that may be considered negative, false, derogatory and/or detrimental to the business reputations of Defendants;

(iii) Plaintiffs breached the Settlement Agreement's non-assignment clause by assigning Torres' rights under the Settlement Agreement to Sinn; and

(iv) the assignment is null and void.

Defendants' performance under the Settlement Agreement is excused.

55. Taylor and Atlas are entitled to recover reasonable and necessary attorneys' fees and costs in connection with their request for declaratory judgment.

BREACH OF CONTRACT

56. Torres, Taylor, Marshall, Atlas, Sinn, XS, and Aspire have a valid, enforceable contract.

57. Defendants fully performed, attempted to perform, and/or tendered performance of all of their obligations under the contract.

58. As described above, Plaintiffs have materially breached their obligations to Defendants under the contract. These breaches include Plaintiffs disparagement of the Defendants, their breaches of their warranties that no assignment of interest had been made, and their actual assignment of such interests.

59. The Parties agreed not to disparage one another. When the Plaintiffs' conduct suggested that they were not performing that obligation under the agreement, Defendants reasonably requested information within Plaintiffs' possession to demonstrate that they had not violated their non-disparagement obligations. Instead of simply providing the information requested, the Plaintiffs unreasonably withheld it – not just before the filing of this case but during its pendency.

60. Until the Plaintiffs' unsolicited contact with Taylor and their subsequent refusal to provide information requested, the Defendants were in and intended to remain in compliance with their obligations under the Settlement Agreement. The Plaintiffs' admission that they had breached the Settlement Agreement and subsequent retraction, followed by numerous conflicting explanations hindered the Defendants' ability to perform.

61. The duty to cooperate is implied in every contract in which cooperation is necessary for performance of the agreement. The Plaintiffs' refusal to provide information necessary to ensure compliance with the Settlement Agreement constitutes a breach of the Plaintiffs' duty to cooperate.

62. The Plaintiffs additionally breached their duty to disclose material facts. After sending the picture to Taylor, they were obligated to provide the remainder of the material facts – including the text messages referenced by them but not disclosed.

63. Defendants have suffered damages as a result of the breaches of contract alleged herein, including but not limited to the attorneys' fees incurred by them while seeking cooperation from Plaintiffs and business disruption.

64. Defendants are entitled to recover reasonable and necessary attorneys' fees and costs in connection with Sinn, Torres, XS, and Aspire's breach.

Fraud in the Inducement

65. Sinn, Torres, XS, and Aspire represented and warranted to Atlas and Taylor that they had not assigned any of their rights under the Agreement. This representation was material for a number of reasons, including but not limited to Sinn, Torres, XS, and Aspire's knowledge that without it, Atlas and Taylor would never have agreed to make payment in the amount of $500,000.

66. Sinn, Torres, XS, and Aspire's representation that they would not and had not assigned any of their rights under the Agreement was false when made and was made with the intent that Atlas and Taylor act on it by signing the Agreement and making payments thereunder.

67. Atlas and Taylor have been harmed by Sinn, Torres, XS, and Aspire's fraud by, among other things, making payment of $290,000, thinking it would go to Torres when it actually went to Sinn as a result of their undisclosed assignment.

68. Sinn, Torres, XS, and Aspire's conduct was knowing, intentional, and malicious. Atlas and Taylor are entitled to an award of exemplary damages.

DEMAND FOR INDEMNITY

69. Paragraph 11 of the Settlement Agreement is entitled "Warranty by Torres" and reads in full as follows:

> **Warranty by Torres**. Torres hereby represents and warrants that he has not assigned or otherwise transferred to any other person or entity any interest in any claims, actions, demands and/or causes of action he has, or may have, or may claim to have in connection with the matters released hereby and/or the persons and entities released herein, and hereby agrees to indemnify and hold harmless all persons or entities hereby released from any and all injuries, harm, damages, penalties, costs, losses, expenses and/or liability or other detriment, including, without limitation, all reasonable attorneys' fees incurred as a result of any and all claims, actions, demands, and/or causes of action of whatever nature or character which may hereafter be asserted against any such released persons or entities by any person or entity claiming by, through or under Torres by virtue of such an assignment or other transfer. Torres further represents and warrants that he is not aware of any actual or potential disputes, claims, or causes of action they do or may have against any of the Atlas Releasors that are not waived and released under the terms of this Agreement.

Exhibit M (emphasis in the original). Sinn is the beneficiary of an assignment made by Torres in violation of the Settlement Agreement. Sinn and Torres' false affidavits in support of their motions for summary judgment notwithstanding, the Sinn parties have brought suit to recover money they claim to be owed "by, through or under Torres by virtue of" the assignment from Torres to Sinn. Torres is therefore required to indemnify Atlas, Taylor and Marshall "from any and all injuries, harm, damages, penalties, costs, losses, expenses and/or liability or other detriment, including, without limitation, all reasonable attorneys' fees incurred" as a result of this lawsuit.

SANCTIONS

70. After receiving the photo, Plaintiffs advised that the picture had been sent by Sinn to people with whom Atlas did business. After receiving notice from Defendants that sending an obscene photo to their customers would be actionable, Plaintiffs changed their story to say that it had been sent to people who do business with Aspire, Sinn's company. Later, Plaintiffs claimed that the photo had been sent to a few friends with no text at all.

71. Taylor and Atlas reasonably requested that Plaintiffs provide evidence that they had done what they last claimed to have done – sent the photo to a few friends, inadvertently sending

it to Taylor in the process, but had not disparaged Defendants. Instead of providing Taylor and Atlas with the texts themselves, Plaintiffs – over an extended period of time – provided a number of conflicting explanations.

72. After filing this lawsuit, Plaintiffs insisted – for years – that the only issue before the Court was whether sending the photo itself constituted a breach of the non-disparagement agreement. They used that pretext to withhold evidence that they had in fact disparaged Defendants. By the time Plaintiffs were compelled to produce texts referring to Defendants, Defendants had incurred thousands of dollars in attorneys' fees.

73. Sending the photo and providing varying and mutually exclusive explanations compelled Defendants to determine whether a breach had occurred. Defendants' insistence that the Plaintiffs provide evidence of their compliance with the Settlement Agreement was reasonable. The Plaintiffs' conduct – from outright refusal to obstruction of discovery, was not. Defendants should not be forced to bear the cost of that unreasonable conduct.

74. Torres had actual notice that a claim was likely to be filed regarding the photo. Just one day after they sent the photo, counsel for Atlas made the following demand pursuant to the notice provision of the Settlement Agreement, and which Torres now admits he received:

> Request is further made that no files related to this be deleted. Please direct both of your clients to place a litigation hold on all related documents, phones and computers. **They are not to dispose of any electronic device**.

Exhibit D (emphasis added). Even without such notice, however, Torres had a legal duty to preserve evidence, including but not limited to his text messages and his phone.

75. Torres was served with discovery requesting his text messages. Shortly after receiving that request, Torres disposed of his phone.

76. Request was made for any backup copies of Torres' texts. First Torres said that no backup copies existed. At summary judgment, Torres changed his story and said that backups might exist. Despite repeated requests, no texts have ever been produced by Torres.

77. Pursuant to Chapters 9 and 10 of the Texas Civil Practice and Remedies Code and Rule 13 of the Texas Rules of Civil Procedure, Defendants are entitled to recover the fees, costs, and other damages they incurred simply trying to obtain the information Plaintiffs unreasonably concealed for years – and which caused this litigation to be filed in the first place.

UNJUST ENRICHMENT

78. Through their many misrepresentations, Plaintiffs have been unjustly enriched. In particular, the Plaintiffs have received $260,000 as the result of their promises not to disparage the Defendants and as a result of their promise not to assign any portion of their interest in the Settlement Agreement.

E. MAXIMUM DAMAGES

79. Defendant/counter-Plaintiff seeks in excess of $1,000,000 in damages, exclusive of pre- and post-judgment interest, attorneys' fees, and costs of court.

F. CONDITIONS PRECEDENT

80. All conditions precedent to recovery by Defendants have been performed or have occurred.

G. JURY DEMAND

81. Atlas and Taylor have demanded trial by jury and the required jury fee has been paid.

V. CONCLUSION

82. Defendants Craig Taylor, Atlas Commodities, LLC, and James Marshall pray that a take-nothing judgment be rendered against Plaintiffs, and that, on final trial of this cause, Defendants have and recover judgment of and against Plaintiffs as follows:

a. an award of actual damages in an amount to be determined by the jury;

b. an award of damages for loss of goodwill or loss of business reputation in an amount to be determined by the jury;

c. an award of exemplary damages in an amount to be determined by the jury;

d. an award of attorney's fees in an amount to be determined by the jury pursuant to Chapters 37 and 38 of the Texas Civil Practice and Remedies Code;

e. Indemnification from Torres;

f. for prejudgment interest on all amounts awarded at the legal rate until final judgment;

g. for post-judgment interest at the highest rate allowed by law, on all amounts awarded until paid;

h. for costs of court and for all other and further relief to which they may show themselves to be justly entitled.

Respectfully submitted,

BERG FELDMAN JOHNSON, LLP

By: /s/ Geoffrey Berg

Geoffrey Berg (gberg@bfjblaw.com)
Texas Bar No. 00793330
Kathryn E. Nelson (knelson@bfjblaw.com)
Texas Bar No. 24037166
4203 Montrose Boulevard, Suite 150
Houston, Texas 77006
713-526-0200 (tel)
832-615-2665 (fax)

ATTORNEYS FOR CRAIG TAYLOR, ATLAS COMMODITIES, LLC, AND S. JAMES MARSHALL

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served by electronic filing, certified mail, return receipt requested, email, and/or facsimile on October 17, 2016 as follows:

Kenneth M. Krock
(kkrock@rk-lawfirm.com)
Terri S. Morgan
(tmorgan@rk-lawfirm.com)
Megan N. Brown
(mbrown@rk-lawfirm.com)
Rapp & Krock
3050 Post Oak Boulevard, Suite 1425
Houston, Texas 77056
Fax: (713) 759-9967

/s/ Geoffrey Berg
Geoffrey Berg